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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DARYL THOMAS JACKSON, Defendant and Appellant.	E061119 (Super.Ct.No. FVA1100111) OPINION

APPEAL from the Superior Court of San Bernardino County. Gerard S. Brown, Judge. Affirmed.

Thomas Owen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal and Junichi P. Semitsu, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Daryl Thomas Jackson guilty of sexual penetration by a foreign object when the victim was prevented from resisting by an

intoxicating or anesthetic substance, or a controlled substance, and this condition was known by defendant (Pen. Code[1], § 289, subd. (e), count 2); oral copulation when the victim was prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known by defendant (§ 288a, subd. (i), count 4); rape when the victim was prevented from resisting by an intoxicating or anesthetic substance, or a controlled substance, and this condition was known by defendant (§ 261, subd. (a)(3), count 6); incest (§ 285, count 7); and sexual battery (§ 243.4, subd. (e)(1), count 8).[2] The court sentenced defendant to the upper term of eight years on count 2, the upper term of eight years on counts 4 and 6, and six months on count 8, all of which it ran concurrent to the term on count 2. The court imposed the midterm of two years on count 7, which it stayed under section 654. Thus, the court imposed a total term of eight years in state prison.

On appeal, defendant argues that the court abused its discretion when it sentenced him to the upper term on counts 2, 4, and 6. We affirm.

FACTUAL BACKGROUND

Defendant is Jane Doe's father. He first met Doe when she was eight years old and then had no contact with her until she was 15. He watched her play in her high

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[1] All further statutory references will be to the Penal Code, unless otherwise noted.

[2] Defendant was acquitted of the following offenses: sexual penetration when the victim is unconscious (§ 289, subd. (d), count 1); oral copulation when the victim is unconscious (§ 288a, subd. (f), count 3); and rape of an unconscious person (§ 261, subd. (a)(4), count 5).

school basketball games two times per week. Since he had been absent most of her life, Doe felt good about finally having a father figure in her life.

In 2001, Doe was in college and was home for her summer break. She was 19 years old. She went to defendant's house to spend time with him one day. They had lunch and talked. At one point, she complained of having knots in her back, so he told her to relax and take a shower. After the shower, he told her to just wrap a towel around herself so he could massage her back and get the knots out. She trusted him and did so. He then told her to lie on her stomach and he would use baby oil to massage her. He massaged her and at some point she fell asleep. She woke up when she felt him turning her body over onto her back and moving his hands up her legs. Defendant then got in the bed next to her. Doe felt uncomfortable, so she got up and went into the bathroom. Then, she noticed that there was baby oil on her breasts and genitals. She had never given defendant permission to touch those areas. She confronted him, and he said he just wanted to relax her. Doe was upset and began to pack her things to leave. Defendant apologized and promised he would never do it again. Doe left and reported the incident to the sheriff's department. The sheriff's department took a statement and told her there was nothing they could do because she was over the age of 18. During the next two years, defendant tried to call Doe, but she refused any contact with him.

In 2003, defendant called Doe and told her he had another baby and that she now had a sister. Defendant also had a son, who was Doe's half brother. Doe decided that she would give defendant a second chance, so that she could meet her sister and be with her family. Doe visited defendant and his daughter over the next few years.

On Thanksgiving Day 2010, Doe went to visit defendant at his girlfriend's house, where he was living. She had dinner with family members and spent the weekend there. On Sunday evening, defendant and Doe took her brother to the airport. They returned to defendant's girlfriend's home at around 9:00 p.m. They sat in the car discussing what type of relationship Doe should have with defendant's girlfriend. Defendant and Doe then went inside. They went upstairs to the loft and watched television on the couch. Defendant said he was going to make himself a drink and asked if Doe wanted one. She said yes. He left the room and returned a few minutes later and gave her a glass of tequila and ice. After she finished, defendant asked if she wanted another one, and she said yes. Doe drank a little over half of the second drink and did not want to finish because she could feel the effects of the alcohol. Defendant said, "Are you going to drink your drink?" When she said no, he asked, "Are you sure? I can get you some more." They continued to talk, and Doe fell asleep. She was partially awakened when she heard defendant calling her name. She went back to sleep, but came in and out of consciousness. Doe could feel defendant's hands on her stomach and breasts, under her clothes. She could also feel him rubbing the outside of her vagina. Then, she felt his fingers go inside her vagina. She tried to tell him to stop and to push him away with her feet. She felt him on top of her and tried to push him away with her arms, but they felt heavy. Doe felt like "everything was so hazy." She then felt him lift her up and carry her.

Doe woke up the next morning in the bed in her sister's room. She felt drained and groggy and had a headache. Doe got up and went to the bathroom, where she noticed

that her panties were halfway down her buttocks. She also felt a "stretching sensation in [her] vagina like [she] had been penetrated." She took a shower and went to work. At the time, she was working for defendant at his company. She asked defendant if there was anything he wanted to tell her, and he said no. She noticed that defendant was "extra kind and accommodating," which was unusual. Doe was not sure what had happened the night before, and she felt afraid and embarrassed, so she did not contact the police at that time.

Doe continued to work for defendant for another month or so. During that period, defendant began calling her late at night asking her how she felt about him intimately. He also sent her lewd text messages. She finally confronted defendant on the telephone, and he admitted that, on "that night" he touched her by "rubbing and sucking on [her] breasts." He also admitted that he touched her vagina, inside and outside, orally copulated her, and raped her. Doe then told defendant she was not coming to work anymore, and she reported the incident to the police. An officer arranged for Doe to call defendant the next day so their conversation could be recorded. A recording of the phone call was played for the jury at trial. During the phone conversation, defendant admitted that he "made the choice to rape [Doe]" and that "[i]t was a bad choice." He said he was sorry for touching her and violating her. Doe said she trusted defendant. Defendant told Doe he loved her, and that he had a "lapse in judgment which was totally uncalled for, inconsistent, and there [was] no excuse for it." Defendant further told her, "My responsibility . . . is to tell you that I was wrong . . . . That I wronged you. I raped you.

It was uncalled for. Unnecessary. And it is my responsibility to never let it happen again."

Defendant testified on his own behalf at trial. He said that, during the Thanksgiving weekend in 2010, he and Doe went inside the house and she brought drinks upstairs for the two of them. After they finished those drinks, Doe went downstairs and made two more drinks for them. Defendant admitted to digitally penetrating and orally copulating Doe, but said Doe initiated the sexual activities.

ANALYSIS

The Trial Court Properly Imposed the Upper Term

Defendant argues the court abused its discretion when it imposed the upper term on counts 2, 4, and 6. He asserts that the court discussed the heinousness of the crimes, found that the crimes demonstrated planning and sophistication, and found that defendant engaged in violent conduct. He contends the court improperly concluded that these factors outweighed the mitigating factors that he had no prior record, he showed remorse, he was at low risk for reoffending, and the crimes did not occur on different occasions. He also asserts that the probation department recommended the midterms on counts 2, 4, and 6. We conclude that the court properly sentenced defendant to the upper term on those counts.

A. *Standard of Review*

" 'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as well as quantitative terms" [citation] . . . . We must affirm unless there is a clear showing the

sentence choice was arbitrary or irrational.' " (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.)

B. *Relevant Background*

In her probation report, the probation officer listed the following circumstances in aggravation, pursuant to California Rules of Court, rule 4.421: the manner in which the crime was carried out indicated planning, sophistication or professionalism, in that defendant "provided an intoxicating drink to be able to commit the acts he committed"; and defendant "has engaged in violent conduct, which indicates a serious danger to society." As to circumstances in mitigation, the probation report listed the fact that defendant had no prior record. The probation officer recommended the midterms on all counts.

At the sentencing hearing, the court read the factors in aggravation and mitigation from the probation report. It then allowed both parties to be heard and to react to the probation officer's recommendation. The prosecutor noted that, even though there was no force used in the rape, defendant provided drinks, which had unusual effects on Doe, including her moving in and out of consciousness. The prosecutor argued that defendant knew what he was doing, and "his mind is evil." The prosecutor pointed out that defendant's conduct in the current incident was similar to his prior contact with Doe, when she was asleep and he took advantage of her. The prosecutor further pointed out that defendant did this to his own daughter and that there was another daughter in the family who was young. Therefore, the prosecutor asked the court to impose the maximum sentence.

The court proceeded to discuss the rules on consecutive sentencing, which applied here. The court then stated: "So . . . my plan is this: I want to weigh a couple things. I want to weigh the heinousness of this crime—which is incredibly heinous—or crimes against the fact which I must take into consideration as to the probation department has and the Rules of Court [*sic*] the fact that the defendant does have no prior criminal record. [¶] So what I am going to do is the following: I'm going to deviate slightly from the probation department. And on Count No. 2, I'm going to sentence the defendant to the aggravated term of eight years. And then I'm going to run concurrent—okay?—Count No. 4. And I'll run the aggravated term of eight years concurrent to . . . Count 2. And then on Count No. 6 the aggravated term of eight years concurrent. [¶] And then Count No. 7, that will be the midterm of two years. And then what I'm going to do is stay that pursuant to 654, [be]cause that is clearly 654. And then . . . Count No. 8, which . . . he was found guilty of, is a six-month misdemeanor, and I'm going to run that concurrent. Okay? [¶] So the total time in state prison is eight years."

C. *Defendant Forfeited His Claim by Failing to Object*

Citing our Supreme Court's decision in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the People argue that we should not consider defendant's arguments because he forfeited them by failing to object on these grounds at the time of sentencing. We agree. In *Scott*, our Supreme Court held that a defendant must object at the time of sentencing to the trial court's failure to properly make or articulate sentencing choices. (*Id.* at pp. 352-353.) Defendant did not object at the sentencing hearing when the trial court sentenced him to the upper term. Because he did not object, he has forfeited the claim on appeal.

(*Id*. at p. 356.) Defendant asserts that he did not forfeit his claims since, after the court pronounced the sentence and was advising him of his right to appeal, any objection would have been futile. Assuming arguendo that defendant did not forfeit his claim, it fails on the merits. (See *post,* § D.)

In the alternative, defendant claims that he received ineffective assistance of counsel when his trial attorney failed to object. To prevail on this claim, defendant must demonstrate that his counsel's performance was objectively unreasonable and that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 216.) Defendant's claim fails because, even if defense counsel had objected, the result of the proceeding would not have been different. (See *post*, § D.)

D. *The Court Properly Sentenced Defendant*

"Under the [determinate sentencing law], a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. [Citations.] The [trial] court's discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be 'reasonably related to the decision being made.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 848, fn. omitted.) "In making such sentencing choices, the trial court need only 'state [its] reasons' [citation]; it is not required to identify aggravating and mitigating factors, apply a preponderance of the evidence standard, or specify the 'ultimate facts' that 'justify the term selected.' [Citations.] Rather, the court must 'state in simple

language the primary factor or factors that support the exercise of discretion.' " (*Id.* at pp. 850-851.)

The court here stated a few reasons for imposing the upper term on counts 2, 4, and 6. It first noted the factors in aggravation cited by the probation officer, which included that the manner in which the crime was carried out indicated planning, sophistication or professionalism, in that defendant "provided intoxicating drinks to be able to commit the acts he committed" and that defendant engaged in violent conduct, which indicated a serious danger to society. The court also considered that the crimes were heinous. The court noted the one factor in mitigation listed in the probation report, that defendant had no prior record. These were all proper factors for the court to consider. (Cal. Rules of Court, rules 4.421 & 4.423.)

Defendant argues the court erred in finding that the crimes showed planning, sophistication, and professionalism, since it relied on a fact that was not proven at trial—that he served Doe an intoxicating drink with the "intent to drug the victim" and "to be able to commit the acts he committed." He asserts that his intent was not proven at trial. While the court did mention that defendant "provided mixed drinks with intent to drug the victim" when it was listing the criteria affecting probation, it did *not* mention his intent to drug the victim when it discussed the factors in aggravation. The court did state that defendant provided drinks "to be able to commit the acts he committed." The court properly considered such factor, since the jury found true the element of the crimes in counts 2, 4, and 6, that an intoxicating substance prevented the victim from resisting; and that defendant "knew or reasonably should have known that the effect of an intoxicating

substance prevented the [victim] from resisting." Moreover, the evidence showed that defendant and Doe drank tequila together when they spent time together. Thus, it was reasonable for the jury to infer that he knew drinking would get her intoxicated and prevent her from resisting him. The evidence also showed that, on the night of the incident when Doe did not finish her second drink, defendant encouraged her to finish and offered to get her more. Therefore, it was reasonable to infer that defendant served her alcohol to get her drunk and take advantage of her.

Defendant argues that, while the court may have been disgusted with him engaging in sexual conduct with his own daughter, thereby calling the crimes "incredibly heinous," it "cannot use this personal view as a basis for imposing the upper term." However, a proper consideration for the court was that the crimes "involved . . . acts disclosing a high degree of cruelty, viciousness, or callousness." (Cal. Rules of Court, rule 4.421(a)(1).) The court could rely on the facts that the victim was defendant's own daughter, and he served her drinks that rendered her unconscious to the point she could not resist his sexual conduct with her. Though the trial court described the crimes as "heinous," as opposed to "callous" or "cruel," the effect is the same.[3] Defendant was particularly callous in the way that he committed his crimes. He committed heinous acts against Doe while she was unconscious. Then, at trial, he blamed his sexual misconduct on her, claiming that she initiated the acts with him. Defendant had absolutely no regard

[3] "Heinous" means "outrageously evil or wicked" (Webster's New World Dict. (3rd College Ed. 1988) p. 626); "callous" means "lacking pity, mercy, etc.; unfeeling" (*id*. at p. 199); and "cruel" means "causing, or of a kind to cause, pain, distress, etc." (*id*. at p. 333).

for his daughter or her well-being and only cared about his own sexual needs. Moreover, although the court did not mention this factor, defendant clearly violated a position of trust. (Cal. Rules of Court, rule 4.421(a)(11) ["The defendant took advantage of a position of trust or confidence to commit the offense"].)

Defendant further argues that his crimes were not violent, since he did not threaten Doe with a weapon or use force to overpower her. He also argues that he was not a danger to society, since there was no evidence he ever engaged in improper sexual conduct with anyone else. While we acknowledge that defendant did not threaten Doe or use force to overpower her, we note that he did not need to, since he gave her alcohol to intoxicate her before committing the offenses.

Defendant also argues that the court "glossed over" the mitigating factors that he had no prior record, he showed remorse, and the probation department found he was at low risk of reoffending. However, the court read and considered the probation report. We note that the probation report only listed one circumstance in mitigation—that defendant had no prior record.

In any event, "a single factor in aggravation suffices to support an upper term." (*People v. Osband* (1996) 13 Cal.4th 622, 730.) The court here listed at least two factors adequately supported the imposition of the aggravated term—the manner in which the crime was carried out included planning, sophistication, and professionalism, and the crimes were heinous. (See *ante*.) We further note that the court ran the sentences on counts 4, 6, and 8 concurrent to the sentence on count 2. In view of the aggravating

factors, we cannot say that the court's decision to impose the upper terms was arbitrary or irrational.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

MILLER
J.

CODRINGTON
J.